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No. 86-686

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS THE APPEAL

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I. Introduction

Appellees' motions to dismiss this appeal contain several serious misstatements of fact. Since the Court cannot feasibly investigate the accuracy of appellees' assertions by an independent review of the record at this stage of the proceeding, the burden falls on appellants to expose these mischaracterizations. Given the strict limitation on the length of a responsive brief of this kind and the sheer number of appellees' misstatements, the performance of this task will necessarily occupy nearly all of the content of this brief. Except for a short discussion of the "ripeness" issue and a concluding summary of the parties' positions, appellants will be required to forego any additional response to appellees' arguments other than what already appears in the Jurisdictional Statement.

II. Appellees' Mischaracterizations of the Record

A. Availability of Standard Offers to Out-of-Area QFs

Both of the appellees represent to the Court that the various "standard offers"

developed by the Commission were and are generally unavailable to any QF located outside the purchasing utility's service area.* These assertions could not be further from the truth. As pointed out in the Jurisdictional Statement, the very decision of the Commission that established the terms of its standard offers dealt at some length with this issue and unequivocally concluded that each utility should be required to extend its standard offers to any QF who desired to "wheel" power to it from outside its service area (J.S.App. C, pp. 107-12). This policy was thereafter consistently applied and was indeed reaffirmed by the Commission in the specific context of the present controversy. It will be recalled, in that regard, that PG&E initially proposed a version of the "interim solution" to its transmission constraints which would have

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* Thus, the Commission's brief describes the standard offers as "contracts which QFs within the California utilities' service areas could enter into with those utilities" (PUC Brief, p. 3; emphasis in original). PG&E's brief similarly recites that "Standard Offer forms cannot be used for out of area projects for technical problems independent of the underlying dispute" (PG&E Brief, p. 26).

excluded out-of-area QFs from participation in that arrangement, and that the Commission expressly rejected that restriction and expanded the interim solution to encompass out-of-area QFs in response to a petition by Hydropool and two California QFs who were located outside PG&E's service area (J.S.App. H, pp. 8-9). It was only at this point that PG&E, while acquiescing in the inclusion of the two California QFs, persuaded the Commission to reverse its decision solely with respect to Hydropool by focussing the Commission's attention on the separate "question of the terms and conditions, if any, under which out-of-state QFs should be allowed intercon- nection" to PG&E's transmission system (J.S. App. B, p. 16a; emphasis added). That was the first time that any utility was ever allowed to withhold a standard offer from any QF on the ground that the QF was located outside its service area.

B. Displacement of Economy Power

Although both appellees incorrectly suggest that the Commission acknowledged from the outset that potential displacement of economy

energy would constitute a valid excuse for a utility's refusal to accept QF power (PUC Brief, p. 4n.4; PG&E Brief, p. 9n.8), the Commission's counsel's assertion to that effect is the more surprising in light of the particular item of evidence which they cite in purported support of that assertion. In this connection, the Commission states in its brief:

> "In a decision in an unrelated proceeding, a 1983 PG&E general rate case, the Commission stated: 'Before committing transmission resources to QFs, we would want to ascertain whether Northwest power would be displaced as a result.' Decision 83-12-068, Dec. 22, 1983, at 331 (unpublished). This illustrates the Commission's early and ongoing concern with the problem of QF displacement of transmission capacity reserved for economy energy." (PUC Brief, p. 4n.4).

It is ironic that the Commission's counsel should choose this particular out-of-context quotation from the decision in the 1983 rate case to support its present position on this issue, because the Commission itself has previously issued a contempt citation to PG&E for its identical reliance upon this identical quotation to support an identical position on this same issue in an earlier proceeding. As noted in the Jurisdictional Statement, when the

Commission first learned of PG&E's transmission constraints, it reprimanded PG&E for its failure to disclose this problem at an earlier time and for its attempt to deal with the problem unilaterally by imposing certain restrictions on its acceptance of any QF power that might displace economy imports (J.S.App. F, pp. 58-71). In defense of its actions, PG&E cited the very passage from the opinion in the rate case which is now relied upon in the Commission's brief as alleged evidence of the Commission's "early and ongoing concern" with displacement of economy energy (id., p. 59). In response to PG&E's citation of this passage, the Commission chided PG&E for "tak[ing] this statement out of the context of the limited record we had before us in the rate case, [and] apply[ing] it to its alleged current transmission constraints" as a basis for refusing QF deliveries (id., p. 59; see also id., pp. 67, 89). The Commission went on to reject PG&E's contention that potential displacement of economy energy was a sufficient justification for the refusal of QF power, and

issued an order to show cause why PG&E should not be held in contempt for refusing QF deliveries on this ground in the face of the Commission's earlier decisions affirming the availability of standard offers to all QFs regardless of the existence of any such problem (id., pp. 59-71).* In view of this record, there is a distinct element of hypocrisy in the Commission's current effort to invoke this same quotation to justify PG&E's refusal of Hydropool's deliveries on this same ground.

The true facts respecting this issue are as recited in the Jurisdictional Statement. As was there shown, the Commission repeatedly and emphatically declined to accept potential displacement of economy power as a valid excuse for refusing to accept power deliveries from any QF, and instead consistently held that this factor should simply be taken into account in

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* PG&E was ultimately acquitted of the contempt charge, but only after the Commission found that the evidence presented in its defense had "done little to dispel our uncertainty regarding either PG&E's compliance with our decisions or its commitment to the development of alternate generation" (Decision No. 84-08-031, p.33; see J.S.App. G).

computing the utilities' system-wide average avoided costs for the purpose of setting the prices for purchases of QF power in their standard offers (J.S.Apps. C, pp. 72-78; D, p. 114; E, p. 38; F, pp. 59-71; H, pp. 8-9). Once again, the Commission was persuaded to reverse itself on this issue only when it confronted the "special case" presented by the "out-of-state" location of Hydropool's projects.

C. The Alleged Disproportionate Impact of Hydropool's Deliveries

PG&E states in its brief that "Hydropool would displace as much [economy] energy as it generates," and then proceeds, from that premise, to construct an elaborate mathematical proof that Hydropool would displace "seven times as much low cost energy" as would the California QFs whose output would also flow on the Intertie (PG&E's Brief, p. 21). The proof is fallacious because the premise is false. As the record shows and as PG&E itself admits elsewhere in its brief, Hydropool would displace economy imports only during certain hours of the day in a single season of the

year, and would therefore not even come close to displacing "as much energy as it generates" (PG&E Brief, p. 20; J.S.App. X, pp. 360-61, 365, 835; PG&E Brief, App. B-5-6).

Appellants have conceded in their Jurisdictional Statement that, even though the displacement caused by Hydropool's output is miniscule, in absolute terms, by comparison with that caused by the numerous California QFs whose output flows on the Intertie (see J.S.App. U, p. 16), there are certain limited conditions under which Hydropool might theoretically cause a proportionally greater displacement of economy imports than a California QF delivering an equivalent amount of energy. There is no evidence in the record, however, that would establish either the reality or the extent of this differential impact. PG&E cannot remedy this deficiency in its proof simply by misstating the facts.*

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* Appellees of course bear the burden of proof on this issue. Maine v. Taylor, __ U.S. __, 106 S.Ct. 2440, 2448 (1986); Hunt v. Washington State Apple Adv. Comm., 432 U.S. 333, 353 (1977).

D. The Alleged "Alternative" of Delivering Power over Other Transmission Lines

Appellees repeatedly assert that Hydropool "chose" to attempt delivery of its output over the Intertie in preference to an "alternative" method of transmission which it rejected "for its own business reasons" (PUC Brief, pp. 2, 10, 16; PG&E Brief, pp. 15, 22). While these assertions are not fabrications in the strict sense, they were surely made with tongue in cheek. For obvious reasons, the only practical way for a QF to deliver its output to a purchasing utility is over the transmission lines of the local utility with which it is already connected or from which it would ordinarily obtain its electrical service (see J.S.App. C, pp. 108, 141; 45 Fed.Reg. 12217, 12221). All of Hydropool's projects, naturally, are connected to or served by Washington and Oregon utilities whose only ultimate point of connection to PG&E's system is over the Intertie that links the Northwest power grid to the transmission systems of the California utilities (see J.S.Apps. S, pp. 4-5;

U, att. 1).* The Intertie is thus the only available existing route for transmission of Hydropool's output to PG&E (J.S., App. S, p.12). Hydropool's only "alternative" to the use of the Intertie for this purpose, therefore, would consist of the construction of its own private transmission line across the several hundred miles between its projects and the nearest PG&E area line, an undertaking which is obviously well beyond the financial capacity of Hydropool or any other small power producer. As indicated by the testimony cited by appellees in support of their assertions on this issue, however, this was precisely the "alternative" method of transmission which PG&E suggested to Hydropool and which appellees now assert that Hydropool "chose" to reject "for its own business reasons" (PG&E Brief, App. B-12-13). Although this testimony does not ex-

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* As appellees note in their briefs, there is one other, much smaller transmission line that crosses the California border in the southwest corner of Oregon (J.S.App. U, att. 1). This line is not accessible by any of Hydropool's projects, and is therefore of no relevance whatever to the present dispute (J.S.App. S, p. 12).

plicitly reflect whether PG&E's suggestion in this regard was initially made in jest, appellees' representation to this Court that this absurd proposal actually afforded Hydropool a serious alternative to the use of the Intertie to transport its output to PG&E is certainly a joke gone sour.

E. Expansion of the Commission's Investigation to Encompass All Out-of-Area QFs

The last of the misleading arguments that will be examined here reflects not so much a mischaracterization of the record as it does a subterfuge previously perpetrated by the Commission itself. This is the argument that the Commission has effectively eliminated the basis for any charge of discrimination against interstate commerce by revising its challenged order, in purported response to Hydropool's petition for rehearing, to encompass an expanded investigation into "the broader issues of out-of-service area and out-of-state QF power" (J.S.App. L, p. 3 (emphasis added); PUC Brief, p. 12; PG&E Brief, p. 15).

In the first place, as noted in the

Jurisdictional Statement, the circumstances of the issuance of this modification of the order strongly suggest that this action was a mere legal maneuver having no real purpose other than the frustration of Hydropool's effort to obtain judicial redress for the discrimination being practiced against it. It will be recalled that the modification was issued after the time for action on Hydropool's rehearing request had already expired, after Hydropool had already filed its petition for review in the state Supreme Court, and while the Commission's counsel were engaged in preparing their response to that petition (J.S.Apps. L, Q). It is also worth noting that the modification recites no explanation whatever for the Commission's sudden inclination to reexamine the question, long since answered in the affirmative by its earlier decisions, whether out-of-area QFs should have the same right as other QFs to participate in both the standard offers and the interim solution (J.S.App. L). Given all of these circumstances, it is hard to avoid the conclusion that the belated

modification of the Commission's order should be treated more as a partisan pleading than as a sincere enunciation of administrative policy.

Secondly, even if the modification were not merely pretextual, it would be irrelevant in any event to the present dispute because it is purely prospective in its operation and fails to remedy the previous discrimination to which Hydropool has already been subjected. Even if the Commission now genuinely intends to treat out-of-state QFs the same as out-of-area California QFs in its future decisions, the fact remains that it was not doing so when it abrogated Hydropool's contracts. As noted above, at the very time it excluded Hydropool from participation in Standard Offer No. 4 and the interim solution on the express ground that it was an "out-of-state" QF, the Commission let stand the right to such participation which it had previously granted to the two out-of-area California QFs who had joined with Hydropool in successfully petitioning the Commission to expand the scope of the interim solution to encompass out-of-area QFs (J.S.App. H). The

subsequent modification of the Commission's order has done nothing to alter this discriminatory result or to afford Hydropool the equal treatment that it would have received if the mandate of the Constitution had been observed by the Commission at the relevant time. Thus, whatever its motive, the order on rehearing provides no ultimate excuse for the Commission's otherwise clearly improper action.

F. Other Misstatements

Space does not permit full consideration of the several additional red herrings and misstatements that appear in appellees' briefs.* Appellants must trust that, by this point, the Court will have become sufficiently convinced of the need for skepticism with regard to any of appellees' assertions that these will not readily be accepted without careful examination of their evidentiary support.

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* These include, among several others, (1) the assertion that Hydropool, unlike the California QFs, is seeking "direct" connection to the Intertie, when in fact Hydropool's output would be delivered to Washington and Oregon utilities and transmitted to the Intertie over their area lines, in precisely the same manner that the output of the (contd.)

III. The "Ripeness" Question

Appellees contend that Hydropool has failed to exhaust its remedies and that the issue presented by this appeal is "not yet ripe for review" because the Commission is presently undertaking an "investigation [that] will decide under what conditions, if any, a Standard Offer type arrangement should be made

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(contd.) California QFs would reach the Intertie over the area lines of PG&E or, in the case of out-of-area California QFS, over the lines of other neighboring utilities (J.S.App. S, pp. 4-5); (2) the contention that the Commission's order excluding QF power from the Intertie "north of Round Mountain Substation" applies, not only to out-of-state QFs, but also to those California QFs whose generating plants are located north of that point on that Intertie, when in fact the order has no such application because Round Mountain Substation is the northernmost point of connection to the Intertie within California and all of the area lines to which QFs in that part of the state would deliver their power therefore connect to the Intertie either at Round Mountain or at some more southerly point (J.S.App. U, att. 1); and (3) the contention that Hydropool's contracts were not submitted in the manner required by the terms of the standard offer, when in fact (a) those contracts were tendered in perfect conformity with those terms, (b) PG&E's half-hearted contentions to the contrary were consistently disregarded by the Commission, and (c) PG&E itself has conceded that any technical arguments of this sort that it may still wish to raise should be addressed only on remand following the disposition of this appeal on the merits (PG&E Brief, p. 5n.4).

available to QFs in Hydropool's situation" (PUC Brief, p. 21; PG&E Brief, pp. 29-30). In fact, however, the issue presented here and the issues to be addressed in that investigation pass each other like ships in the night. The issue before this Court is whether Hydropool is constitutionally entitled to enforce its executed standard-offer agreements and thereby to sell its power to PG&E at the prices prescribed therein and under the same terms and conditions as have been previously afforded to QFs located in California, including the terms of the interim solution. That issue has been finally decided by the Commission and will not be reconsidered in the current investigation, as the Commission itself made clear when, in the very order that announced that investigation, it reaffirmed its determination that "Hydropool does not have the ability to tender Standard Offer 4 contracts to PG&E under the terms of the interim solution" (PG&E Brief, App. H-18). The only matters to be addressed in the new investigation are, in the Commission's words, the development of different

"pricing and curtailment options" for out-of-state and out-of-area QFs and the determination whether these QFs should be allowed to sell their power to California utilities under "some other pricing arrangement" than that embodied in the previously existing standard offers (PG&E Brief, App. H-16-18). An investigation into these matters obviously holds no prospect of affording the relief presently sought by Hydropool, which consists, not of the creation of "some other pricing arrangement" for its power sales, but rather of the enforcement of the arrangement it has already made with PG&E pursuant to the price terms and regulations of the Commission in force at the time it executed its contracts. It is thus impossible that Hydropool will obtain either a reversal of the Commission's earlier rejection of its claim or any other effective redress of its grievance as a result of the further administrative proceedings. It follows, under a long line of decisions of this Court addressing this precise type of situation, that neither the ripeness doctrine nor the exhaustion requirement

presents any obstacle to the consideration and disposition of this appeal on its merits. Greene v. United States, 376 U.S. 149, 162-63 (1964); McNeese v. Board of Educ., 373 U.S. 668, 674-75 (1963); Hillsborough Township v. Cromwell, 326 U.S. 620, 624-25 (1946); Montana Natl. Bank v. Yellowstone County, 276 U.S. 499, 505 (1928); Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 590-91 (1926).

IV. Summary and Conclusion

Aside from their various mischaracterizations of the record, appellees' arguments appear directed primarily toward establishing the legitimacy of the Commission's concerns about deliveries of power from out-of-area QFs and the potential displacement of economy imports. Their entire effort in this regard is beside the point, however, because appellants readily concede the legitimacy of these concerns. Indeed, appellants further concede that these concerns perhaps might have justified the preclusion of Hydropool's sales to PG&E if they had been applied both even-handedly and prospectively.

The very point of this case, however, which appellees seem to miss, is that these admittedly legitimate concerns were not applied in this way, but were instead enforced in a manner that was both discriminatory and unfairly retroactive. Thus, even while it was denying Hydropool the right to sell to PG&E, the Commission was granting that same right to other QFs who differed from Hydropool only with respect to their in-state location and whose situation was otherwise identical to Hydropool's in every respect, including their need to "wheel" power to PG&E from outside its service area and the adverse impact of their deliveries on economy imports. Similarly, the Commission repeatedly rejected, over a long period of time, the suggestion that either of these concerns would justify a utility's refusal to accept power from any QF, and reversed its position in this regard only after Hydropool had invested substantial sums in reliance on its assurances and almost a year after Hydropool had accomplished the final step that was necessary, under the Commission's own rules, to consummate

a binding contract for the sale of its power to PG&E. As this Court has often pointed out in its decisions under both the Commerce Clause and the Contract Clause, even a concededly legitimate concern of a state government will lose its legitimacy for constitutional purposes when it is applied either in a manner that singles out out-of-state firms for special treatment or in such a way as to upset deliberately induced contractual expectations. E.g, Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 243-44 (1978). That is the situation in this case, and that is the reason why appellants are entitled to relief from this Court.

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Respectfully submitted,

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